IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

STATE OF TEXAS, *Plaintiff*,	§	
v.	§	EP-17-CV-179-PRM
YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, AND THE TRIBAL GOVERNOR CARLOS HISA OR HIS SUCCESSOR, *Defendants.*	§	
YSLETA DEL SUR PUEBLO, THE TRIBAL, COUNCIL, AND THE TRIBAL GOVERNOR CARLOS HISA OR HIS SUCCESSOR, *Counter-Plaintiffs,*	§	
KEN PAXTON, IN HIS OFFICIAL CAPACITY AS THE TEXAS ATTORNEY GENERAL, *Counter-Defendant.*	§	

COUNTER-DEFENDANT KEN PAXTON'S MOTION FOR SUMMARY JUDGMENT

Federal and state law authorize the Attorney General of Texas to seek injunctive relief against the Ysleta del Sur Pueblo to stop illegal gaming activities on the Tribe's reservation. *See* 25 U.S.C. § 1300g *et seq.*; TEX. CIV. PRAC. & REM. CODE § 125.002(a). The Tribe argues in its First Amended Counterclaim (Doc. 121) that

General Paxton is violating the Equal Protection Clause by seeking that remedy in this lawsuit.[1]

The counterclaim lacks merit. There is nothing constitutionally infirm about the criminal or civil laws that underlie Texas's request for injunctive relief. Nor does the Tribe have competent summary judgment evidence of unequal enforcement of those laws. The Tribe runs a gambling operation that violates multiple provisions of Texas law. No one else in Texas is violating the law the way that the Tribe is. The Tribe's counterclaim should be dismissed.

I. BACKGROUND

On August 18, 1987, Congress restored federal tribal status to the Ysleta del Sur Pueblo. *See* 25 U.S.C. § 1300g-1, § 1300g-2. The Restoration Act reestablished the trust relationship between the United States and the Tribe—which had been terminated in 1968—and re-invoked the federal assistance and services the Tribe received by virtue of this relationship. *See* Tiwa Indians Act of 1968, Pub. L. 90-287, 82 Stat. 93 (1968) (terminating the federal trust relationship between the Tribe and the United States); 25 U.S.C. § 1300g-5 (repealing Tiwa Indians Act); 25 U.S.C. § 1300g-2 (restoring the federal trust relationship between the Tribe and the United States).

[1] The other named Defendants/Counter-Plaintiffs in this case are the Ysleta del Sur Pueblo Tribal Council and Governor Carlos Hisa, in his official capacity. *See* Doc. 8 ¶¶ 2–3. For simplicity, this motion will generally refer to Defendants/Counter-Plaintiffs collectively as the "Tribe."

In 1987, to secure passage of the Restoration Act, and to avail itself of the benefits of a trust relationship with the United States federal government, the Tribe pledged to refrain from gambling on its land. This mutually beneficial *quid pro quo*—a commitment to prohibit gambling in exchange for the benefits of a trust relationship with the United States—was so fundamental to the passage of the Restoration Act that the tribal resolution prohibiting "gambling or bingo in any form" appears in the text of the Restoration Act. *See* 25 U.S.C. § 1300g-6a. That tribal resolution reads, in part:

> the Ysleta del Sur Pueblo remains firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation . . . the Tribe strongly believes that the controversy over gaming must not be permitted to jeopardize th[e] [Restoration Act] . . . , the purpose of which is to ensure the Tribe's survival, protect the Tribe's ancestral homelands and provide the Tribe with additional tools to become economically and socially self-sufficient; . . . the Ysleta del Sur Pueblo respectfully requests its representatives in the United States [Senate] and House of Representatives to amend [§ 107(a) of the Restoration Act] by striking all of that section as passed by the House of Representatives and substituting in its place language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land.

Tribal Resolution No. T.C.-02-86 (1986); *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1328 (5th Cir. 1994) ("*Ysleta I*") (quoting Tribal Resolution No. T.C.-02-86 (1986); citing Restoration Act's legislative history).

In 2002, the Pueblo was found to be operating illegal "slot machines" and illegal "card and dice games." *Tex. v. del Sur Pueblo*, 220 F. Supp. 2d 668, 674-75 (W.D. Tex. 2001), *modified* May 17, 2002. The district court observed that the Pueblo

"ha[d] embarked upon a long-continued habitual course of conduct clearly violative of the Gambling Laws of the State of Texas and that [the Pueblo], unless enjoined, w[ould] continue such habitual illegal activities[.]" *Id.* at 700. The Court then issued an injunction prohibiting the Pueblo from engaging in illegal gambling in violation of Chapter 47 of the Texas Penal Code. *Id.* at 697–98. The Fifth Circuit upheld that decision on appeal. *State of Tex. v. Pueblo*, 69 F. App'x 659 (5th Cir. 2003).

Over the next 14 years, further litigation over the district court's injunction ensued, with the Tribe being held in contempt twice. *See*, *e.g.*, *Tex. v. Ysleta del Sur Pueblo*, 431 F. App'x 326, 329 (5th Cir. 2011) (affirming contempt order for illegally operating eight-liner machines); *Tex. v. Ysleta del sur Pueblo*, No. EP-99-CV-320-KC, 2015 WL 1003879, at *4 (W.D. Tex. Mar. 6, 2015) (Cardone, J.) (finding Tribe in contempt for operating illegal sweepstakes); *see also State of Tex. v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991, at *26-27 (W.D. Tex. May 27, 2016) (denying Tribe's motion to vacate the injunction and ordering the Tribe to cease operating the illegal sweepstakes within 60 days of the Court's order).

The Tribe has not stopped violating Texas law. The operations on the Tribe's reservation have shifted somewhat—they are now what the Tribe describes as bingo—but Texas alleges, and has overwhelming evidence, that the one-touch gaming machines on the Tribe's reservation do not comport with Chapter 47 of the Texas Penal Code. Texas has filed a motion for summary judgment and permanent injunction contemporaneously with this motion, and for the sake of brevity,

incorporates those facts here. *See* Texas's Motion for Summary Judgement and Permanent Injunction at 3–8.

II. DEFENDANTS' COUNTERCLAIM

The Tribe asserts a counter-claim against Ken Paxton in his official capacity for allegedly violating the Fourteenth Amendment's Equal Protection Clause. *See* Doc. 121 ¶¶ 152–177. The counterclaim appears to raise two arguments: (1) the Bingo Enabling Act—which allows Texans to play charitable bingo in limited circumstances—violates the Equal Protection Clause because it "omit[s] Indian nations and their members" from the list of organizations authorized to conduct bingo, *id.* ¶ 162; and (2) other individuals and entities in Texas are offering various forms of gaming but are not being prosecuted, and thus, General Paxton "has specifically targeted Indian nations and reservation Indians for increased scrutiny and increased legal burdens," *id.* ¶ 176.

For the reasons discussed below, the Court should reject both contentions.

III. STANDARD OF REVIEW

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); FED. R. CIV. P. 56(a). A genuine issue of material fact only exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986);

id. at 252 ("mere existence of a scintilla of evidence" is insufficient to defeat summary judgment).

IV. ARGUMENT

A. The Tribe is not a proper claimant under Section 1983.

Through 42 U.S.C. § 1983, Congress "provided a cause of action against state actors" for deprivations of rights secured by the Constitution, including violations of the Equal Protection Clause. *See Jordan v. Fisher*, 823 F.3d 805, 810 (5th Cir. 2010); *see, e.g.*, *Udeigwe v. Texas Tech Univ.*, 733 F. App'x 788, 792 (5th Cir. 2018) (noting that a constitutional claim cannot be brought as standalone claim under the Fourteenth Amendment). Many cases under Section 1983 concern whether a plaintiff has properly filed suit against a "person" acting under color of state law. *E.g.*, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (holding that a "state is not a 'person' within the meaning of §1983."). This case is different; the preliminary determination the Court must make is whether the Tribe is a proper *claimant* to pursue a Section 1983 remedy.

As the Supreme Court has explained, Section 1983 "permits 'citizen[s]' and 'other person[s] within the jurisdiction' of the United States to seek legal and equitable relief from 'person[s]' who, under color of state law, deprive them of federally protected rights. *Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty.*, 538 U.S. 701, 708 (2003) (quoting 42 U.S.C. § 1983). In *Inyo County*, the Court addressed whether an Indian tribe could qualify as a claimant—a "person within the

jurisdiction" of the United States—for purposes of Section 1983. *Id.* The claimant-tribe asserted that its sovereign immunity shielded it from a county's attempt to seize employee records as part of a welfare fraud investigation. *Id.* Because the tribe's constitutional claim for violations of the Fourth and Fourteenth Amendments rested on its status as a sovereign, the Court held that the tribe was not vindicating private rights against government action, and thus, could not recover under Section 1983. *Id.* at 712; *see id.* at 709 (noting "the Court's 'longstanding interpretive presumption that a 'person' does not include the sovereign'" (citation omitted)).

The Fifth Circuit has not addressed the scope of the *Inyo County* decision, but other courts, following *Inyo County*, have dismissed Section 1983 claims tethered to a tribe's assertion of sovereignty. For example, in *Fort Independence Indian Community v. California*, a tribe sued the State of California, contending that California violated the Equal Protection Clause in negotiations with the tribe over a gaming compact. 2008 WL 6137129, at *1 (E.D. Cal. Sept. 10, 2008). The court noted that the tribe's interest in gaming "only exists by the plaintiff's status as a sovereign" and that its asserted constitutionally protected interest "is one that a similarly situated private party would not enjoy." *Id.* at *5. For that reason, the court found that "the right asserted by the Tribe is not a private right that falls within the scope of" Section 1983, and dismissed the equal protection claim. *Id.*

The same outcome is warranted here. The Tribe—and by extension, those acting on behalf of the Tribe, including the Tribal Council and Governor Hisa—are

raising interests as a sovereign. One of the primary arguments in the First Amended Counterclaim, for example, is that General Paxton does "not have the authority to enforce laws concerning the State of Texas's regulatory jurisdiction on the Ysleta del Sur Pueblo reservation or lands of the Ysleta del Sur Pueblo." Doc. 121 ¶ 155. This right at issue derives from the Tribe's status as a federally recognized tribe. Specifically, the Tribe asserts that it "is entitled to engage in gaming activities 'not prohibited by the laws of the state of Texas' as a federal right and interest under the Restoration Act." *Id.* ¶ 141. No similarly situated private party in Texas would be able to raise this defense to criminal prosecution or a civil enforcement action; if a private citizen were operating an illegal casino, that citizen would not be able to claim that the State could not enjoin gambling at the casino because of the citizen's assertion of immunity under federal law.

The Tribe is not acting in any "capacity resembling a private person." *See Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514 (9th Cir. 2005) (citation and internal alterations omitted) (holding that tribe asserting communal fishing rights reserved to it as a sovereign was not a "person" under Section 1983). Instead, the Tribe is shifting one of the primary arguments it has raised in this case—sovereign immunity and the sovereign right to engage in gaming—from a defense to Texas's affirmative claims to an element of an equal protection claim. *Inyo County* forecloses the Tribe from adopting this tactical shift. The Tribe's equal protection counterclaim must be dismissed.

B. The Bingo Enabling Act is not unconstitutionally written or enforced.

The Tribe makes the bizarre argument that the Bingo Enabling Act is unconstitutional because it does not specifically list Indian tribes among authorized organizations allowed to conduct bingo.[2] Doc. 121 ¶ 162. The Bingo Enabling Act is facially neutral, authorizing the issuance of bingo licenses to, among other groups, fraternal organizations and volunteer fire departments. *See* TEX. OCC. CODE § 2001.101(a). A "fraternal organization" is defined as "a nonprofit organization organized to perform and engaged primarily in performing charitable, benevolent, patriotic, employment-related, or educational functions that meet the other requirements of this chapter." *Id.* § 2001.002(11)(A). And "volunteer fire departments" mean a "fire-fighting organization that: (A) operates fire-fighting equipment; (B) is organized primarily to provide fire-fighting service; (C) is actively providing fire-fighting service; and (D) does not pay its members compensation other than nominal compensation." *Id.* § 2001.002(28). These terms are straightforward, non-discriminatory, and make no unnecessary reference to racial, ethnic, or social groups.

[2] The Tribe does not argue that the Restoration Act is unconstitutional. Such an argument would fail, because "[i]t is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979). Moreover, the Restoration Act confers benefits on the Tribe with no attendant unfavorable treatment; instead, it provides that the Tribe is on an equal footing to engage in gaming that any other citizen of Texas can do, but cannot participate in unlawful gaming activities. *See* 25 U.S.C. §1300g-6(a).

The undisputed evidence is that the Tribe has a volunteer fire department that obtained a license from the Texas Lottery Commission to conduct bingo. *See* Ex. A, Deposition of Carlos Hisa at 48:17-25–49:1-3. In fact, the Tribe's expert witness, Philip Sanderson, is the former director of the Texas Lottery Commission's Bingo Operations Division who approved the Tribe's application. Ex. B, Deposition of Philip Sanderson at 35:2-23. The fire department has not actually responded to a fire in the community, Ex. A at 55:3-5, meaning it likely does not qualify to conduct bingo at present, but the fact that the application was approved indicates that the Tribe is not unable to participate in charitable bingo in Texas. The Bingo Enabling Act does not violate the Equal Protection Clause and it is not being unconstitutionally applied to the Tribe.[3]

C. The Tribe does not identify similarly situated individuals or entities who are being treated more favorably.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Tribe's counterclaim, which, as discussed above, hinges primarily on its assertion of sovereignty, is best characterized as a "class of one" equal protection claim, and

[3] Because the Ysleta del Sur Pueblo Fraternal Organization has refused to participate in discovery, it is unclear whether the Fraternal Organization would be eligible for a license to conduct bingo. Defendants should be excluded from offering any evidence on that point, given the Fraternal Organization's repeated efforts to frustrate the discovery process.

thus, the Tribe must prove that it "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *see also United States v. Antelope*, 430 U.S. 641, 645 & n. 6 (1977) ("[F]ederal legislation with respect to Indian tribes . . . is not based upon impermissible racial classifications"); *Unkechauge Indian Nation v. Paterson*, 752 F. Supp. 2d 320, 326–27 (W.D.N.Y. 2010) (applying rational basis review to argument by tribe that New York could not constitutionally impose cigarette tax collection system on tribe but not other tax-exempt entities); *Husain v. Casino Control Com'n*, 265 F. App'x 130, 134 (3d Cir. 2008) ("[T]here is no fundamental constitutional right to gamble").

The Tribe cannot adduce evidence to meet this burden. First, there is no competent summary judgment evidence that other individuals or entities in the State of Texas are engaging in the kind and degree of illegal gaming that the Tribe is. As detailed in Texas's motion for summary judgment, the Tribe is operating over 2,500 one-touch gaming machines that are available to the public 24 hours a day, 7 days a week. These machines resemble slot machines and have no limit on the amount of prize money that patrons can win. Gross receipts from the gaming at Speaking Rock totaled approximately $70 million in 2017 alone.

The Tribe alleges in its First Amended Counterclaim that there are various "game rooms" and bingo halls in Texas that offer gaming but that may not be authorized by the Texas Lottery Commission. *E.g.*, Doc. 121 ¶¶ 121, 137–139. There

are no allegations that the amount of gross and net profits from those gaming activities are anywhere close to what the Tribe brings in on an annual basis. Nor has the Tribe provided any evidence in discovery of what type of gaming is even occurring in these game rooms and bingo halls. Finally, the context is crucial. The Tribe has been held in contempt twice for violating a prior injunction of this Court prohibiting the Tribe from violating Texas law. There is no evidence of other entities in Texas with a history of continuously refusing to abide by Texas gambling laws. For these reasons, the Tribe has not met its burden of showing that General Paxton is treating similarly situated groups differently.

To the extent the Tribe's counterclaim is an attack on General Paxton's decision to bring this case and not cases against other entities engaged in allegedly illegal gambling, *e.g.*, Doc. 121 ¶ 168, the reason is straightforward and embedded in the structure of the Texas Constitution. The duties of the Attorney General of Texas "are distinct and generally unrelated to the duties of county and district attorneys to represent the State in criminal prosecutions." *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 930 (Tex. Crim. App. 1994) (en banc); *see* TEX. CONST. art. 5, § 21; TEX. CODE CRIM. PROC. ANN. arts. 2.01, 2.02. Assistant Attorneys General may be deputized Assistant District Attorneys or Assistant United States Attorneys in criminal manners, if brought in by the local prosecuting attorney. *See, e.g.*, *State v. Fellows*, 471 S.W.3d 555, 557 n.1 (Tex. App.—Corpus Christi 2015, pet. ref'd); *United States v. Davis*, 690 F.3d 330 (5th Cir. 2012). As the First Court of Appeals has explained,

"a district attorney may employ any assistant prosecuting attorney, including an assistant attorney general, he deems necessary to carry out the constitutional duties of his office." *Gaitlan v. State*, 905 S.W.2d 703, 707 (Tex. App.—Houston [1st] 1995, pet. ref'd).

This explains why General Paxton has not independently brought other criminal actions under Chapter 47; as a general matter, such prosecutions are reserved for county and district attorneys. Moreover, although the Attorney General may bring civil enforcement actions to enjoin nuisances, the statute also allows nuisance suits to be filed by "an individual . . . or by a district, county, or city attorney." TEX. CIV. PRAC. & REM. CODE § 125.002(a). Thus, the "game rooms" in Harris County and elsewhere in Texas are subject to potential criminal actions under Chapter 47 and civil injunctive suits by a host of potential plaintiffs under the Texas Civil Practice and Remedies Code.

The same is not true with respect to the Tribe. The Tribe points to no specific statutory grant of authority for a local district or county attorney to prosecute gambling crimes on the Tribe's reservation or bring a civil injunctive action in state court, and in fact, has argued that local district attorney would be precluded from doing so under the Restoration Act. *See* Ex. C, Preliminary Injunction Hearing Transcript (Nov. 13, 2017) at 38:20-25–39:1-7. This explains the necessity of General Paxton bringing this action and not others: Texas has limited authority to halt

violations of gaming laws on the Tribe's reservation, with this suit being the primary, if not sole, method of doing so.

Finally, there are three federally recognized Indian tribes in Texas: the Ysleta del Sur Pueblo, the Alabama-Coushatta Tribe of Texas, and the Kickapoo Traditional Tribe of Texas. The Alabama-Coushatta, which is also governed by the Restoration Act, is currently operating a gaming facility on its reservation in Livingston, Texas. Texas has sued to enjoin the Alabama-Coushatta, and that suit is pending in the Fifth Circuit. *See State of Texas v. Alabama-Coushatta Tribe of Texas*, No. 18-40116 (5th Cir. 2018). The Kickapoo, which is not governed by the Restoration Act, is operating the Lucky Eagle Casino in Eagle Pass, and is currently regulated by the National Indian Gaming Commission. *See* Ex. D, Amended Gaming Ordinance (Mar. 17, 2017), https://www.nigc.gov/images/uploads/gamingordinances/20170317OrdAmendAppr.pdf. General Paxton has not brought an enforcement action against the Kickapoo. The Tribe is not alleging unequal treatment between the three federally recognized tribes in Texas, and cannot do so given the circumstances.

It is not an equal protection violation for General Paxton to pursue an injunction when there is tangible evidence of serious violations of the law—including testimony from a licensed peace officer; testimony from a former director of the Texas Lottery Commission's Charitable Bingo Operations Division; and even testimony from the Tribe's own expert witness, who acknowledged a year ago that the Tribe's one-touch machines would not be approved by the Texas Lottery Commission. *See* Ex.

E, Preliminary Injunction Hearing Transcript (Nov. 14, 2017) at 20:7-14. The Tribe's counterclaim cannot survive summary judgment.

V. CONCLUSION

The Court should dismiss the Tribe's Equal Protection Clause counterclaim.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

DAVID A. TALBOT, JR.
Acting Chief, General Litigation Division

/s/ Michael R. Abrams
MICHAEL R. ABRAMS
Texas Bar No. 24087072
BENJAMIN S. LYLES
Texas Bar No. 24094808
Assistant Attorneys General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 475-4074 | FAX: (512) 320-0667
michael.abrams@oag.texas.gov
benjamin.lyles@oag.texas.gov

ATTORNEYS FOR COUNTER-DEFENDANT KEN PAXTON

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2018, a true and correct copy of the foregoing was filed using the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/ Michael R. Abrams
MICHAEL R. ABRAMS
Assistant Attorney General